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No. 08-515

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

NORTH TEXAS SPECIALTY PHYSICIANS,

*Petitioner,*

v.

FEDERAL TRADE COMMISSION,

*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

# REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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North Texas Specialty Physicians ("NTSP") respectfully files this reply to the Brief in Opposition filed by the Federal Trade Commission ("Commission") to NTSP's petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

## REPLY IN SUPPORT OF PETITION

Although NTSP disputes most of the findings by both the Commission and the court of appeals below, NTSP in its Petition for a Writ of Certiorari focused tightly on three salient points for this Court:

1. The court of appeals, like the Commission, relied in large part on attempted collusion as a basis for the ruling that NTSP violated Section 1 of the Sherman Act;

2. Attempted collusion is not a violation of Section 1 of the Sherman Act, and this Court's decision in *California Dental*, allowing for a quick-look rule of reason analysis, was not intended to make attempted collusion a violation of Section 1 of the Sherman Act; and

3. The decision of the court of appeals is inconsistent with the decision of the Sixth Circuit Court of Appeals in *Worldwide Basketball*, which properly required that "the contours of the market and, where relevant, submarket, are sufficiently well-known or defined to permit the court to ascertain" whether the *California Dental* test of easily-ascertained anticompetitive effects is satisfied.

The Brief for the Federal Trade Commission in Opposition ("Opposition") fails to address any of these points head-on.

The Commission's approach to the first point is to discuss findings other than the numerous ones relying on attempted collusion. The Commission, however, does not dispute that the court of appeals based its finding of a violation of Section 1 of the Sherman Act on NTSP's conduct as a whole. Opposition at 14. Nor does the Commission dispute that the conduct considered included mere encouragement by NTSP; the Commission even cites to such statements in its Opposition. Opposition at 13, n.4 (discussing statements in court of appeals decision that it is "logical to conclude" and there is a "natural tendency" to find anticompetitive effects). The Commission simply fails to address NTSP's recital of the repeated instances of reliance of such conduct raised in NTSP's petition. *See* Petition at pp. 20-21, citing references to "encouragement," "urging," and "theoretical" effects by the court of appeals at App. 27-28, 34-35, and 45.

The Commission does not explain why the court of appeals decision can stand if any substantial basis for the appellate decision is attempted collusion. After acknowledging the attempted collusion portions of the analysis, the Commission merely discusses other aspects of the court of appeals decision as support for the outcome.[1] But NTSP's

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[1] Those other aspects were hotly-contested by NTSP, but in the end were admitted by the Commission and its expert not to have had any impact on physician prices or output. *See* Petition at pp. 8-9.

point was never that the "only" basis for the court of appeals decision is attempted collusion—the point is that attempted collusion is at least a *part*, indeed a substantial part, of the basis for the decision. By reaching a decision based on conduct "as a whole" and relying in part on attempted collusion and the hypothetical effects of attempted collusion, the court of appeals decision is in error and should be reversed. As this Court has ruled, "an order may not stand if the agency has misconceived the law." *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943); *accord Fed. Election Comm'n v. Akins*, 524 U.S. 11, 25 (U.S. 1998) ("If a reviewing court agrees that the agency misinterpreted the law, it will set aside the agency's action and remand the case-even though the agency (like a new jury after a mistrial) might later, in the exercise of its lawful discretion, reach the same result for a different reason."). The same is true for a court of appeals.

The Commission fails to concede the second point that attempted collusion cannot be a violation of Section 1 of the Sherman Act and that the Court in *California Dental* did not intend to create a violation for attempted collusion. The Commission's position seems to be that attempts to collude are "obvious anticompetitive effects" that can be used to support a violation under a quick-look analysis. The Commission fails to address NTSP's argument that "anticompetitive effects" as used in *California Dental* properly should be restricted to actual restraints of price or output by the physicians, rather than a hypothetical postulation of how price or output would have been affected if the physicians had in fact colluded. The Commission's failure to acknowledge these incorrect applications of the law

by the court of appeals strongly supports the need for this Court to clarify that attempted collusion cannot excuse a litigant's failure to make a proper rule of reason showing under *California Dental*.

Third, the Commission attempts to ignore the conflicting decision of the Sixth Circuit in *Worldwide Basketball* by stating that an extensive market analysis is not necessary for a quick-look analysis. The Commission again misses the point. The Sixth Circuit held that anticompetitive effects cannot be "easily ascertained" under the *California Dental* test without "the contours of the market and, where relevant, submarket" being "sufficiently well-known or defined" to make that conclusion. 388 F.3d 955, 961 (6th Cir. 2004). The Sixth Circuit does not necessarily require an extensive market analysis, but it does require at least a showing of the contours of an obvious relevant product and geographic market. *Id.* at 961 (precise product market was "neither obvious nor undisputed" and "simply will not suffice") and 962 (failure of plaintiff to "identify a relevant market" is grounds for dismissing Sherman Act claim).

The court of appeals decision in this case cannot be made to conform with the decision in *Worldwide Basketball*—the decision in this case allowed a quick-look analysis to occur, and a Section 1 violation to be found, without even a statement of a proposed relevant geographic or product market, let alone a showing that such markets were "obvious," "well-known," or "defined." The Commission makes no attempt even now to describe the relevant geographic or product market, and certainly does not demonstrate that these types of health care markets

are "obvious" or "well-known." Therefore, a conflict exists between the circuit courts regarding the necessity of *at least finding the contours of an obvious relevant market* before applying a quick-look analysis under *California Dental*.

## CONCLUSION

For these reasons and those stated in its Petition, the petition for writ of certiorari should be granted.

Respectfully submitted,

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